Mas Anita bt Abdullah v Lew Wai Koung (No 1)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-306–03 OF 2012
YEOH WEE SIAM J
4 DECEMBER 2012

Civil Procedure — Costs — Security for costs — Whether there was 'reason to believe' that plaintiff would be unable to pay costs — Plaintiff failing to pay earlier judgment sum to defendant — Failure to disclose residential address — Plaintiff frequently out of country — Failing to disclose assets in Malaysia — Failure to disclose financial capability to pay costs — Court's discretionary powers to order security for costs — Rules of Court 2012 O 23 r 1

The defendant had obtained a judgment against the plaintiff in the sessions court for arrears in rental amounting to RM6,750 with interest and costs as well as vacant possession. The plaintiff commenced the present action without paying the said amounts to the defendant. The defendant thus applied for orders that the plaintiff be required to give security for costs in the sum of RM60,000 under O 23 r 1 of the Rules of Court 2012 ('the ROC') and that all proceedings be stayed until the security for costs was paid by the plaintiff. The defendant also prayed for an order that the plaintiff's action be struck unless the security for costs was paid within 14 days.

Held, allowing security for costs of RM40,000:

(1) The facts showed that the plaintiff was capable of not paying costs to the defendant should the plaintiff's claim be later dismissed by the court and costs be ordered against the plaintiff (see para 3).

(2) The plaintiff did not state her residential address in the writ of summons. She merely stated that her address for service was at PO Box 12633, 50792 Kuala Lumpur. It was highly probable that the plaintiff did not have a permanent residential address or she was deliberately refraining from disclosing the same. This shows that there was ample justification for the defendant to apply for security for costs from the plaintiff (see para 4).

(3) The plaintiff was frequently out of the jurisdiction of the court and was in various countries. Even the plaintiff's own solicitors did not know her exact whereabouts outside the jurisdiction of the court. Since the plaintiff was frequently out of the country, it was necessary that she be required to furnish her security for costs (see para 5).

(4) The plaintiff had not disclosed that she had assets in Malaysia. She also

did not give any statement, supported by documentary evidence, of her financial capability to pay all costs, if ordered against her (see para 6); *Adarsh Pandit v Viking Engineering Sdn Bhd* [1996] MLJU 594 referred; *Shaik Ali v Shaik Mohamed* [1963] 1 MLJ 300 referred; *Ace King Ltd v Circus American Ltd & Ors* [1985] 2 MLJ 75 referred.

(5) There is no legal requirement that the defendant gives a detailed bill of costs before he can make this application. The rules regarding the exercise of the court's discretionary powers to order security for costs are not inflexible or rigid (see para 7); *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 referred.

[Bahasa Malaysia summary

Defendan telah memperolehi penghakiman terhadap plaintif di mahkamah sesyen untuk sewa tertunggak berjumlah RM6,750 dengan faedah dan kos dan juga milikan kosong. Plaintif memulakan tindakan ini tanpa membayar jumlah tersebut kepada defendan. Defendan oleh itu memohon untuk perintah-perintah bahawa plaintif dikehendaki untuk memberi jaminan untuk kos dalam jumlah RM60,000 di bawah A 23 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan bahawa kesemua prosiding ditangguh sehingga jaminan untuk kos dibayar oleh plaintif. Defendan juga memohon untuk perintah bahawa tindakan plaintif dibatalkan kecuali jaminan untuk kos dibayar dalam masa 14 hari.

Diputuskan, membenarkan jaminan untuk kos sebanyak RM40,000:

(1) Fakta menunjukkan bahawa plaintif boleh untuk tidak membayar kos kepada defendan sekiranya tuntutan plaintif kemudiannya ditolak oleh mahkamah dan kos diperintahkan terhadap plaintif (lihat perenggan 3).

(2) Plaintif tidak menyatakan alamat tinggalnya di dalam writ saman. Dia hanya menyatakan bahawa alamatnya untuk penyerahan adalah di PO Box 12633, 50792 Kuala Lumpur. Adalah kemungkinan bahawa plaintif tidak mempunyai alamat tinggal tetap atau dia dengan sengaja menahan daripada mengemukakannya. Ini menunjukkan bahawa terdapat justifikasi yang mencukupi untuk defendan memohon jaminan untuk kos daripada plaintif (lihat perenggan 4).

(3) Plaintif kerap berada di luar bidang kuasa mahkamah dan berada di pelbagai negara. Peguam plaintif sendiri juga tidak mengetahui di mana sebenar di luar bidang kuasa mahkamah dia berada. Memandangkan plaintif kerap ke luar negara, adalah perlu yang dia dikehendakki untuk memberikan jaminan dia untuk kos (lihat perenggan 5).

(4) Plaintif tidak mengemukakan yang dia mempunyai aset di Malaysia. Dia juga tidak memberi apa-apa pernyataan, yang disokong oleh keterangan dokumentar, mengenai keupayaan kewangan dia untuk membayar

kesemua kos, jika diperintahkan terhadap dia (lihat perenggan 6); *Adarsh Pandit v Viking Engineering Sdn Bhd* [1996] MLJU 594 dirujuk; *Shaik Ali v Shaik Mohamed* [1963] 1 MLJ 300 dirujuk; *Ace King Ltd v Circus American Ltd & Ors* [1985] 2 MLJ 75 dirujuk.

(5) Tiada keperluan undang-undang bahawa untuk defendan memberi bil kos terperinci sebelum dia boleh membuat permohonan ini. Peraturan-peraturan berkaitan pelaksanaan kuasa budi bicara mahkamah untuk memerintah jaminan untuk kos adalah fleksibel dan tegar (lihat perenggan 7); *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 dirujuk.]

Notes

For cases on security for costs, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2414–2467.

Cases referred to

Ace King Ltd v Circus American Ltd & Ors [1985] 2 MLJ 75, FC (refd)
Adarsh Pandit v Viking Engineering Sdn Bhd [1996] MLJU 594, HC (refd)
Aeronave SPA & Westland [1971] 1 WLR 1146, CA (refd)
Faridah Begum bte Abdullah v Dato' Michael Chong [1995] 2 MLJ 404, HC (refd)
Shaik Ali v Shaik Mohamed [1963] 1 MLJ 300, CA (refd)

Legislation referred to

Rules of Court 2012 O 23 r 1, 1(1)(a), (c), (d)

Vincent Tey Wei Seng (Lainah Yaacob & Zulkepli) for the defendant.
Yau Lap Ho (Yap Lap Ho & Co) for the plaintiff.

Yeoh Wee Siam J:

ENCLOSURE 17

[1] This is the defendant's application for the following orders:

(a) that the plaintiff be required to give security for costs in the sum of RM60,000 under O 23 r 1 of the Rules of Court 2012 ('the ROC');

(b) that all proceedings of this action be stayed until the security for costs is paid by the plaintiff to the defendant's solicitors as stakeholder and the plaintiff's action herein be struck out forthwith unless the security for costs is paid within a period of 14 days from the date of the order of this honourable court;

(c) that costs be in the cause; and

(d) other order or relief deemed just and fair by this honourable court.

THE COURT'S DECISION ON 29 OCTOBER 2012 REGARDING ENCL 17

[2] The defendant's application is allowed except that the sum for security for costs is RM40,000.

GROUNDS FOR THE COURT'S DECISION

[3] According to the evidence, the defendant had obtained a judgment against the plaintiff on 13 September 2011 in the Kuala Lumpur Sessions Court vide Summons No 52–16151 of 2011 for arrears in rental amounting to RM6,750, interest at 8%pa, costs of RM408 and vacant possession but the plaintiff still fails, refuses and/or neglects to pay the amount to the defendant until the date of the filing of this action, eventhough the plaintiff was served with a sealed copy of the judgment. This fact alone, without prejudice to the merits of the present case, shows that the plaintiff is capable of not paying costs to the defendant should the plaintiff's claim be later dismissed by the court and costs be ordered against the plaintiff.

[4] The plaintiff did not state her residential address in the writ of summons. She merely stated that her address for service is at PO Box 12633, 50792 Kuala Lumpur. In the plaintiff's affidavit in reply (encl 21) she stated that she used the PO Box address because she was chased out by the defendant from her rented premises at No 24-A, Jalan 5/60A, Taman Desa Segambut, 51200 Kuala Lumpur. In her second affidavit in reply (encl 37) she stated that she was allowed to stay at the flat No 30-02-04, Sri Melaka Cheras, 56100 Kuala Lumpur, which is owned by one Ibrahim bin Kassim. However, the identity card number of Ibrahim bin Kassim ('Ibrahim') is not disclosed by the plaintiff. The defendant contended that the plaintiff is not telling the truth about her residence at Ibrahim's address. It is highly probable that the plaintiff does not have a permanent residential address or she is deliberately refraining from disclosing the same. This shows that there is ample justification for the defendant to apply for security for costs from the plaintiff pending the final disposal of the suit.

[5] From the records of the plaintiff's passport exhibited by the defendant in exh LWK1, it can be seen that the plaintiff was frequently out of the jurisdiction of this court from 2009–2011, and was in various countries such as Australia, Singapore, Indonesia, the Philippines and China. In para 7 of the

statement of claim, the plaintiff averred that she was on business in Australia from 21 September 2011–16 November 2011. On 4 September 2012 the plaintiff's solicitors wrote to the court asking for the full trial dates fixed on 24 September 2012 and 9 October 2012 to be vacated because the main witness ie the plaintiff was attending a meeting out of the country in UAE and would only be back on 27 September 2012. The plaintiff's solicitors enclosed a copy of the plaintiff's air ticket back to Malaysia but the court notes that the plaintiff's Air Asia flight on 27 September 2012 was from Bali, Indonesia, and not from the UAE. It appears to me that even the plaintiff's own solicitors did not know her exact whereabouts outside the jurisdiction of this court. In encl 37, the plaintiff stated that she was in Indonesia from 16–27 September 2012. On 28 August 2012 when the court had to fix dates for further case management and action by both parties, counsel for the plaintiff asked for more time to take instructions because the plaintiff was away in Australia. In view of fact that the plaintiff is frequently out of the country, it is necessary that she be required to furnish her security for costs. This will serve as a guarantee that, at the end of the day, should costs be awarded in favour of the defendant, in all fairness and in the interest of justice, the defendant would be able realise such costs. In *Aeronave SPA & Westland* [1971] 1 WLR 1146 Lord Denning MR stated 'After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order'.

[6] The plaintiff had not disclosed that she has assets in Malaysia. She also did not give any statement, supported by documentary evidence, of her financial capability to pay all costs, if ordered against her. There are ample authorities on security for costs being ordered by the court when a plaintiff does not have assets within the jurisdiction (see eg *Adarsh Pandit v Viking Engineering Sdn Bhd* [1996] MLJU 594; *Shaik Ali v Shaik Mohamed* [1963] 1 MLJ 300 and *Ace King Ltd v Circus American Ltd & Ors* [1985] 2 MLJ 75).

[7] There is no legal requirement that the defendant gives a detailed bill of costs before he can make this application. The rules regarding the exercise of the court's discretionary powers to order security for costs are not inflexible or rigid (see *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404). The amount for the security costs which I ordered is a reasonable sum ie RM40,000 and not RM60,000 as applied for by the defendant. According to the defendant, the amount of RM60,000 is less than 10% of the amount claimed by the plaintiff for the losses she suffered when the defendant took possession of the premises occupied by the plaintiff. The amount of RM40,000 is therefore an even lower percentage than 10% of the plaintiff's claim. I do not think that this amount is excessive or oppressive to the plaintiff. In fact, this amount is much less than the security for costs that this court has ordered for several other cases.

[8] Under O 23 r 1(1)(c) of the ROC, the court has the discretion to order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it deems just if the plaintiff's address is not stated in the writ or is incorrectly stated therein. A similar order can be given under O 23 r 1(1)(a) if it appears to the court that the plaintiff is ordinarily resident out of the jurisdiction, or under O 23 r 1(1)(d) if the plaintiff has changed her address during the course of the proceedings with a view to evading the consequences of the litigation. From paras 7 and 10 of the statement of claim, the plaintiff came back from Australia on 17 November 2011 (after being away for nearly two months) and found that the defendant had taken possession of the premises which the plaintiff alleged was rented from the defendant. The writ of summons was filed on 12 March 2012 and the plaintiff did not state her residential address in the writ. In encl 21 she stated that she only had the PO Box address because the defendant chased her out from the rented premises. It is highly improbable that from 17 November 2011–12 March 2012, for nearly four months, the plaintiff did not have her own residential address in Malaysia. Having regard to all the circumstances of the case, I am satisfied that it is imperative that security for costs be ordered in case the plaintiff later attempts to evade the consequences of her litigation.

[9] Order accordingly.

Security for costs of RM40,000 allowed.

Reported by Kanesh Sundrum